

FRANK A. KEELE
WILLIAM C. TAYLOR
VAN TAYLOR

IBLA 87-55

Decided March 1, 1989

Appeal from a decision of the Richfield, Utah, District Manager, Bureau of Land Management, cancelling right-of-way U-38379.

Affirmed.

1. Rights-of-Way: Cancellation--Rights-of-Way: Federal Land Policy and Management Act of 1976

Under 43 CFR 2803.1-4, BLM is authorized to require the holder of a right-of-way grant to furnish a bond or other security satisfactory to BLM where necessary to secure compliance with the obligations imposed by the grant and applicable laws and regulations. Where the right-of-way holders have failed to comply with the restrictions of the grant (1) by constructing (without prior notice to or approval by BLM) a pipeline and catchment structure that did not conform to approved specifications and which is located in trespass outside the boundaries of the right-of-way, (2) by creating excessive surface disturbance both on and off the lands covered by the right-of-way, and (3) by disturbing a stream bed in violation of governing laws and regulations, and where it reasonably appears from statements by the holders that they do not intend to take corrective action, BLM properly demands that a performance bond be posted. Under 43 CFR 2803.4(b), BLM, following issuance of notice that the bond is due, may terminate the right-of-way grant if the bond is not posted as directed.

APPEARANCES: Frank Keele, et al., pro sese.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Frank A. Keele, William C. Taylor, and Van Taylor (Keele, et al.) have filed a joint notice of appeal from the September 10, 1986, decision of the Richfield, Utah, District Manager, Bureau of Land Management (BLM), cancelling their right-of-way (U-38379). The right-of-way was granted to Keele

et al., on October 4, 1984, pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), for the construction, operation, and maintenance of a buried irrigation pipeline with concrete diversion structure. The purpose of the pipeline was to divert water from Riley Canyon Creek, to which they owned rights, to their private lands for irrigation purposes. The length of the right-of-way as authorized was 2,450.16 feet, running from northwest to southeast along Riley Canyon Creek from just west of the line between the NW[^] of sec. 33 and the NE[^] of sec. 34, T. 27 S., R. 2 E., Salt Lake Meridian, through the NW[^] of sec. 34.

Riley Canyon Creek is the north fork of Road Creek, which is situated northwest of Loa, Utah. Water in the creek apparently comes from drainage, as well as from Riley Canyon Spring (located in Riley Canyon at the head of Riley Canyon Creek) and Bullberry Spring (located approximately 1 mile downstream). Water from Bullberry Spring evidently runs through a short, unnamed drainage into Riley Canyon Creek. Riley Canyon Creek converges into Road Creek approximately 2 miles downstream (southeast) from its head.

The original proposal for the right-of-way included two concrete catchment structures, one located approximately one-half mile from the head of Riley Canyon Creek, just south of Riley Canyon, and the other downstream at the entry of Bullberry Spring. Environmental review and assessment by BLM officials in conjunction with the State of Utah Division of Wildlife Resources centered around concerns that the pipeline as proposed would not allow maintenance of minimum stream flow. The area was identified as having riparian and wildlife habitat values worthy of preservation. Further, Riley Canyon has a history of flooding during heavy runoff of snowmelts or thunderstorms, and it was feared that construction of the pipeline could reduce the amount of vegetation and cause the area to be more susceptible to flood damage. However, it was concluded that it would be unreasonable to deny an effective use of the water for irrigation purposes if mitigating measures could be instituted to protect riparian and wildlife values.

In order to protect minimum stream flows, the right-of-way as granted allowed only one catchment, located just downstream from Riley Canyon. The catchment at Bullberry Spring was excluded, so that water from Bullberry Spring would continue downstream to maintain riparian values. This action also protected wildlife and riparian habitat along the Bullberry Spring drainage. This alternative was expected to result in the "dewatering" of 900 feet of Riley Canyon Creek between the single authorized catchment and the Bullberry Spring entry point.

The right-of-way as issued contained special restrictive terms and conditions concerning the construction of the irrigation facilities that were developed by BLM during its environmental review. Specifically, Keele, et al., were required to conduct all construction in a manner that would avoid or minimize degradation of air, land, and water quality, and to comply with applicable Federal, State, and local laws and regulations relating to water quality, among others. These special terms and conditions also required restoration of disturbed areas to their natural state, insofar as possible, and disposal of all materials and related litter and debris within

15 days after conclusion of construction activity. BLM authorized the use of 6-inch polyvinyl chloride (PVC) pipe.

These terms and conditions also expressly provided that Keele, et al., would notify the Area Manager of BLM's Henry Mountain Resource Area Office at least 5 days in advance of commencing any construction activities and arrange a pre-construction meeting with representatives of BLM prior to commencing any construction activities. They also provided that construction of the pipeline and diversion structure would conform to the design, specifications, and locations as shown on maps attached to the grant. On October 10, 1984, BLM transmitted the executed right-of-way form to Keele, et al., and expressly notified them that the stipulations required advance notification and a meeting before any construction activities on the pipeline began.

However, Keele, et al., did not comply with this condition, and instead began, and nearly completed, construction of the pipeline without BLM's knowledge or approval. BLM discovered this on September 24, 1985, when it inspected the site. Additionally, the pipeline was found to have been constructed outside the boundaries of the right-of-way grant, and other conditions were allegedly breached by its construction. Following review of the site, on October 15, 1985, BLM placed a memorandum in the file setting out details of alleged noncompliance by Keele, et al., in the construction of the pipeline:

1. The applicants did not contact the Area Manager[, Henry Mountain Resource Area, BLM,] before commencing any construction activities as stipulated in the grant and the cover letter.
2. The distance from private land to the point of diversion was to be no more than 2,450.16 feet. The distance to the completed diversion was measured to be 3,227 feet, 777 feet beyond that authorized.
3. Surface disturbance continues beyond the diversion for an additional 763 feet. The total distance, which has been disturbed beyond that which was granted, is 1,540 feet.

Additionally, BLM found that 3.18 acres had been disturbed outside the right-of-way grant area and that an unauthorized settlement pond had been constructed. There was allegedly extensive disturbance in the stream channel in three locations below the diversion structure. Finally, it appeared that 8-inch PVC pipe had been used instead of 6-inch pipe.

On October 28, 1985, BLM sent a trespass notice to Keele, et al., notifying them that their construction had been built on lands other than those included in their right-of-way grant. This notice was accompanied by a letter notifying them that they had "failed to comply with the applicable laws and regulations and with the terms, conditions, and stipulations of the right-of-way permit." Accordingly, Keele, et al., were ordered to immediately suspend all activities and use associated with the pipeline and diversion structure, as provided by 43 CFR 2803.4(b). BLM enumerated the alleged violations, including those set out above, as well as the following:

1. You failed to acquire a Section 404 Permit from the Corps of Engineers prior to the construction of the facilities authorized under this right-of-way as required by 33 USC 1344(e). [1/]

2. You have not received approval for a change of point of diversion from the Utah State Water Engineer prior to construction of the facilities authorized by this right-of-way grant as required by UCA 73-3-3. [2/]

3. You have not received approval from the Utah State Water Engineer to alter the bed and banks of Riley Creek prior to the construction of the facilities authorized by the right-of-way grant pursuant to UCA 73-3-29. [3/]

BLM summarized the noncompliance in a staff report dated December 20, 1985. According to the report, the pipeline had been constructed in an unauthorized location (800 feet upstream) and in an unauthorized length, without prior approval; the pipeline and diversion structure did not conform to approved specifications; surface disturbance was excessive and in trespass; disturbance of the stream bed violated governing laws and regulations; the site had not been properly cleaned following completion of work; and a joint compliance check was not held after construction was completed.

The record also contains a staff report dated November 13, 1985, detailing a meeting on that date with BLM and Keele et al. A BLM representative asked why they failed to comply with the condition that a preconstruction meeting be held, and Frank Keele reportedly replied that he remembered receiving the letter and had intended to act on it, but the heavy equipment operator hired to do the job of clearing the site arrived sooner than was expected. He also reportedly stated that he had not read the terms and conditions of the right-of-way grant until it was too late. He reportedly blamed the clearing of the area off the authorized site on poor communications with the operator of the heavy equipment.

1/ The record contains a copy of a letter from the Corps of Engineers, U.S. Department of the Army, notifying Frank Keele that he was in violation of section 404 of the Clean Water Act, on account of "the random placement of fill in Riley Creek." The letter advised that, should he "elect to remove all fill material placed in Riley Creek, which was not directly associated with the irrigation facilities, the violation will be resolved."

2/ The record reveals that Keele, et al., applied with the State of Utah Division of Water Rights for a change in their water rights, to allow a new point of diversion. BLM and the Utah Division of Water Resources both protested this application. Additionally, the Fish and Wildlife Service (FWS), U.S. Department of the Interior, noting that the Riley Canyon trespass case was "of major concern," recommended that the diversion point be moved to the original permitted point.

3/ Keele, et al., also evidently filed with the State for permit to alter the stream. This application was also opposed by the Director of the Utah Department of Natural Resources. FWS also recommended that the stream be realigned and contoured to pre-project conditions.

Subsequently, BLM prepared reports concerning the damage allegedly caused by the construction of the diversion and pipeline. BLM set the value of riparian vegetation destroyed by the trespass at \$19,540. In addition, BLM calculated the value of riparian habitat that would be lost if the present unauthorized diversion point were retained to be \$21,740. BLM also developed a reclamation plan for Keele, et al., to follow in repairing the damages allegedly caused by the construction.

On April 22, 1986, citing the violations at the right-of-way site, BLM notified Keele, et al., that they were required to rehabilitate the site according to a rehabilitation outline that was attached to the notice. BLM also held that they were required to post a \$15,000 performance bond no later than May 15, 1986. BLM expressly advised them that, if they did not post the bond, their right-of-way would be canceled. Additionally, BLM refused to authorize Keele, et al., to use and maintain the facilities at the unapproved site until they obtained approval of the change in point of diversion from the State Water Engineer, submitted an amended right-of-way application, and agree to modify the existing diversion to allow a minimum of 0.378 cubic feet per second (cfs) to flow through the structure at all times.

Sometime in May 1986 ^{4/} Keele, et al., filed a letter noting their disagreement with BLM's notice of April 22, 1986, and specifically questioning the requirement that they post a bond. They stated that "[t]he pipeline would be of no benefit if the diversion was located further downstream as you suggest."

On May 29 and 30, 1986, BLM repeated its demand for the posting of a \$15,000 performance bond and reiterated that failure to post the bond within 30 days would result in cancellation of the right-of-way. Subsequently, on June 25, 1986, Keele, et al., evidently filed a notice of appeal of BLM's decision. ^{5/} On June 26, 1986, BLM advised Keele that there was nothing to appeal, since no adverse action had occurred yet. BLM added that they had until July 1, 1986, to comply with its demand for performance bond, and that, if no bond were posted by that time, it would issue a decision letter cancelling the right-of-way, and that this decision would be subject to appeal.

BLM evidently decided to extend the time for compliance with its demand for posting of a performance bond, however. The record shows that, on August 6, 1986, after the deadline for posting the bond had passed, BLM representatives met with Keele, et al., at the site, in order to determine where the approved point of diversion was to be located. At the meeting,

^{4/} It is impossible to state this date accurately, as the BLM date stamp is illegible.

^{5/} This document is missing from BLM's file, and BLM has offered no explanation of its absence. BLM is reminded of its obligations to maintain complete documentary records of disputes before it and to submit this complete record to this Board when an appeal is filed. See Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173, 177 (1986).

Keele, et al., again expressed doubt that taking water from the authorized point would work. However, BLM granted their request for 30 days to evaluate the feasibility of doing so.

On September 10, 1986, BLM issued a decision cancelling the right-of-way, noting that no performance bond had been received within the time allowed. By letter dated September 9, 1986, which evidently crossed in the mail with BLM's September 10 decision, Keele, et al., notified BLM of its decision that the costs of moving the diversion downstream to the authorized location would make the move futile. They suggested that BLM reconsider using the unauthorized location on a trial basis for at least two irrigation seasons. On September 25, 1986, BLM advised Keele, et al., that it declined to reconsider its decision. This appeal followed.

In their statement of reasons, Keele, et al., do not dispute that the pipeline was not built in conformance with the terms of the right-of-way grant. Instead, they briefly set out reasons justifying their failure to comply, and question why the performance bond was not required when the right-of-way was issued.

[1] Under 43 CFR 2803.1-4, BLM is authorized to "require the holder of a right-of-way grant * * * to furnish a bond or other security satisfactory to [BLM], to secure the obligations imposed by the grant * * * and applicable laws and regulations." It is thus clear that BLM may properly require the posting of a bond from a right-of-way holder even after the right-of-way is issued, where necessary to secure compliance with the obligations imposed by the right-of-way grant and regulations.

Regulation 43 CFR 2803.4(b) provides that BLM "may suspend or terminate a right-of-way grant * * * if he determines that the holder has failed to comply with applicable laws or regulations, or any terms, conditions or stipulations of the right-of-way grant." Before terminating the right-of-way grant pursuant to this provision, BLM must give the holder written notice that such action is contemplated and why, and must allow him a reasonable opportunity to cure the noncompliance. 43 CFR 2803.4(d).

In the present case, BLM was authorized to require Keele, et al., to furnish a bond to secure their obligations to comply with the right-of-way. Their failure to comply with the restrictions of the grant, including the fundamental restriction of what lands the right-of-way covered, was clear and undisputed. Further, although BLM had provided them with an opportunity to come into compliance, Keele, et al., had repeatedly refused even to consider moving the diversion out of trespass to the authorized site. Thus, it reasonably appeared to BLM that they were not going to comply. In these circumstances, it was proper for BLM to require the posting of a performance bond. The amount of the bond was conservatively set at \$15,000, which is less than the assessed amounts of damage to riparian habitat. In view of the plain failure of Keele, et al., to comply with the terms of the grant, it would be hard to imagine a case in which a performance bond was more necessary. Compare James L. Morrison, Sr., 87 IBLA 236 (1985) (bond required where right-of-way holder failed to file proof of construction and to maintain a fence around pump site).

As noted above, a right-of-way holder may be properly required by regulation to post a bond to secure the obligations imposed by the right-of-way. Failure to comply with a legitimate demand by BLM to post a bond is therefore a failure to comply with the regulation, and, as such, justifies the termination of the right-of-way by BLM. 43 CFR 2803.4(b); see James L. Morrison, Sr., supra. Here, BLM provided Keele, et al., with notice that termination was contemplated if the bond was not posted, and so met the requirements of 43 CFR 2803.4(d). We note that, although BLM's decision to terminate the right-of-way relied solely on the failure of Keele, et al., to post the bond as required, this action is also amply supported by their evident failure to comply with the terms, conditions, and stipulations of the grant.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member